No. 94-1925

(4)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

SHORT HILLS ASSOCIATES, f.k.a. Prutaub Joint Venture,

Petitioner,

vs.

NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST, SYLVIA ACKELSBERG and DAVID CLINE,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the decision of the New Jersey Supreme Court holding that regional shopping centers could not totally prohibit the distribution of social and political literature on the common sidewalks and other areas outside the enclosed malls rested on adequate and independent state grounds?

2. Whether principles of *stare decisis* require the Court to deny the Petition for a Writ of Certiorari, inasmuch as the questions presented to the Court were fully and properly adjudicated in *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980).

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APPENDIX

Appendix — Stipulations Dated May 31, 1991 ..... 1a

Respondents, New Jersey Coalition Against War in the Middle East, Sylvia Ackelsberg, and David Cline, respectfully submit that The Mall at Short Hills' ("petitioner") petition for a Writ of Certiorari to the Supreme Court of New Jersey should be denied.

COUNTER-STATEMENT OF THE CASE

Respondents make the following corrections and additions to Petitioner's Statement of the Case:

1. Petitioner's petition seriously misapprehends the holding of the New Jersey Supreme Court in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 138 N.J. 326, 650 A.2d 757 (1994), by repeatedly asserting that the court authorized the distribution of literature in the common areas of the enclosed arcade. The opinion of Chief Justice Wilentz specifically held that among the reasonable regulations that a mall might enforce was one restricting expressional activity to "the parking lot, or to common sidewalks and other areas outside the enclosed malls."[1] *Id.* at 378, 650 A.2d at 783.

In light of that holding, petitioner's protests over possible interference with the mall's "monochromatic" architectural design, with its "carefully planned" environment, which is "attractive, comfortable, safe, heated in the winter, air-conditioned in the summer," Cert. Pet. at 6-7, 12, are totally meritless. Similarly irrelevant is petitioner's dissertation about eschewing kiosks in the arcade's common areas in order to avoid "denigrat[ing] the mall's aesthetic atmosphere and obscure sight

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1. Although the New Jersey Supreme Court did not "exclude the *possibility* that the leafletting, to be effective may require access to the enclosed portion of the center," 138 N.J. at 378, 650 A.2d at 783 (emphasis supplied), nothing in the judgment, decision, or record in this matter would require any mall to permit expressive activities indoors.

lines to the stores," *id.* at 7, since the court below did not require that anything be placed in those interior common areas.

Indeed, respondents are mystified by petitioner's attempts to distinguish its "wholly-enclosed shopping center," *ibid,* from what it alleges to be the "open-air shopping center" involved in *Prune Yard.* Cert. Pet. at 12 n. 10. Since Chief Justice Wilentz's opinion authorizes The Mall at Short Hills to exclude people with petitions and leafletters from the "enclosed shopping center," 138 N.J. at 378, 650 A.2d at 783, the only place expressional activity must be allowed is in the "open air" outside the mall itself.

2. Petitioner also misstates the record and the opinion of the court below when it suggests that the case involves efforts by plaintiffs to "solicit[ ] contributions" at the shopping malls. Cert. Pet. at 5. Plaintiffs, in the hearings below, never asserted such a right, *see* 138 N.J. at 375, 650 A.2d at 782, and the court's opinion specifically excluded it:

> [O]ur ruling is confined to leafletting and associated free speech. . . . [T]he sale of literature and the solicitation of funds on the spot (as distinguished from appeals found in the leaflets themselves) are not covered by the protection.

138 N.J. at 375-76, 650 A.2d at 782.

3. Petitioner repeatedly trumpets a self-serving opinion poll it had commissioned and entered into evidence at trial ostensibly to show that some mall patrons would shop less or avoid a mall altogether "to shun leafletting or solicitation by political or religious groups." Cert. Pet. at 9, 12, 23, 23 n. 18. It is revealing that neither the trial court, nor the Appellate Division of the New Jersey Superior Court, despite finding in favor of the defendants,

felt the poll worthy of mention in support of their decisions. *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 266 N.J. Super. 195, 628 A.2d 1094 (Ch. Div. 1991), *aff'd per curiam*, 266 N.J. Super. 159, 628 A.2d 1075 (App. Div. 1993), *rev'd*, 138 N.J. 326, 650 A.2d 757 (1994).

In addition, at no point in this litigation have any of the defendant malls, including The Mall at Short Hills, either at trial or on appeal, introduced *any* evidence or information indicating *any* loss of income, revenue, or business at California shopping malls, during the twelve years since California permitted leafletting in *Robins v. PruneYard Shopping Center*, 23 Cal.3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), *aff'd*, 447 U.S. 74 (1980). 138 N.J. at 342-43, 343 n. 7, 650 A.2d at 765-766. As succinctly noted below: "This record does not support the proposition that one dollar's worth of business will disappear because of plaintiff's leafletting even though some shoppers and non-shoppers may not like it." 138 N.J. at 361, 650 A.2d at 775. Saliently, some of the defendant malls, including the petitioner, are operated by national companies that have facilities in both New Jersey and California.[2] Plainly, they were in a position to ascertain what, if any, economic losses they had sustained in California as a result of the *PruneYard* decision. Their failure to adduce such evidence can lead only to the conclusion, reached by the New Jersey Supreme Court, *ibid*, that no such economic losses ever occurred.

4. Petitioner would disassociate itself from its nine codefendants on the grounds that it does not allow "public service

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2. *E.g.*, Stipulations as to the Mall at Short Hills, admitted into evidence 6/3/91, Resp. App. at ¶ 3. Deposition of Craig Perry, Manager of The Mall at Short Hills, 3/6/91, T8-13 to 15. Petitioner repeatedly cites to a public opinion poll it had taken, *e.g.*, Cert. Pet. at 13, but ignores the trial testimony of Dr. Herbert Abelson, which challenged the methodology and conclusions of the Petitioner's polling expert.

activities" at The Mall at Short Hills.[3] Cert. Pet. at 8. However, in addition to the extensive concert series and Christmas and Easter programs, the petitioner fails to acknowledge these other public events and public amenities stipulated-to by The Mall at Short Hills at trial:

> • The mall sponsors a fitness walk program, which allows access to the mall before daily business hours. The program is sponsored in cooperation with Morristown Memorial Hospital and open to all members of the public who register in writing and receive a license.
>
> • The mall is serviced by publicly subsidized New Jersey Transit buses and there is a New Jersey Transit bus shelter located on the mall's property.
>
> • The mall hires off-duty municipal police officers for mall security. The officers wear their uniforms, guns and badges while so employed. Municipal police cars sometimes patrol the mall parking lot and police officers enforce some traffic ordinances there.[4]

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3. Interestingly, in the state proceedings, the same defense counsel who represented The Mall at Short Hills, also represented another mall defendant, the Riverside Square. However, only The Mall at Short Hills, and not the Riverside Square mall, has filed this petition.

As is the case with many of the defendant malls, the Riverside Square engaged in numerous activities that were open to the public, *e.g.*, 138 N.J. at 384-85, 650 A.2d at 786-787, as distinct from the more limited activities permitted by The Mall at Short Hills. It is respectfully submitted that the shopping mall industry is strategically attempting to use a single regional mall that is less "open" than most as a vehicle for a broader attack on the rights accorded to the states and to the public under *PruneYard*.

4. "Stipulations as to the Mall at Short Hills," admitted into evidence on June 3, 1991 (Resp. App. at ¶¶ 8, 9, 10, 12 & 15).

The hearing below involved extensive testimony about the public activities of each of the defendant malls. Furthermore, the parties stipulated to the facts of the essential physical layouts of the malls.[5] The New Jersey Supreme Court carefully reviewed the record; while it found a lower level of public events and activities at The Mall at Short Hills than take place at other malls, the court concluded that "these differences in the degree of public activity are not material and will not exempt a regional mall from the obligation to permit free speech activity." 138 N.J. at 372-83, 650 A.2d at 780. The court held that regional shopping malls such as The Mall at Short Hills were distinguishable from other shopping centers because of their "mammoth size . . . the proliferation of uses, the all embracing quality of the implied invitation, and the compatibility of free speech with those uses," and, as a result, were compelled to uphold constitutional requirements of freedom of expression. *Id.* at 372, 650 A.2d at 780.

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5. The Mall at Short Hills lies on 46 acres of land. In addition to featuring two major department stores, it contains ten food establishments and 130 other retail, banking, or professional outlets. 266 N.J. Super. at 209, 628 A.2d at 1102. In contrast, the Prune Yard Shopping Center covered only 21 acres, and had only approximately 75 tenants. *Prune Yard*, 447 U.S. at 77.

REASONS FOR DENYING THE WRIT

Implicitly, petitioner asks the Court to overrule its unanimous fifteen-year-old decision in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). Such an extraordinary departure from settled rules of *stare decisis* would be virtually unprecedented.

Nor is there any reason for this Court to reconsider the basic principles of federalism on which *PruneYard* was based: (1) that it is up to each state "to define 'property' in the first instance," *id.* at 84, and (2) that a state is authorized to permit "more expansive rights of free speech and petition than conferred by the Federal Constitution." *Id.* at 85. Indeed, the basic principles of *PruneYard* were just reaffirmed by the Court in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 63 U.S.L.W. 4625, 4631 (U.S. June 19, 1995). In the past decade and a half, the Court has repeatedly cited *PruneYard* approvingly.

Petitioner's reliance on so-called compelled speech cases is misplaced. Unlike, for example, the organizers of a parade, the defendant shopping mall is not engaged in any type of "expressive activity." *See Hurley, ibid.* Moreover, even some property owners who regularly engage in First Amendment activity, such as the cable television company involved in *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445 (1994), may be compelled to facilitate the speech of others pursuant to a public regulation that serves "a compelling, or at least important governmental object" unrelated to the "alteration of speech," *Hurley*, 63 U.S.L.W. at 4631.

Petitioner's effort to resurrect the Fifth Amendment's Taking Clause argument, which was soundly rejected by this Court in *PruneYard*, is equally unpersuasive. As the New Jersey Supreme Court commented in rejecting this argument, "there is no

[constitutional] guarantee of compensation for the exercise of constitutional rights that does not result in even the slightest impact on business or profits." 138 N.J. at 372, 650 A.2d at 780. Furthermore, as set forth in respondents' Counter-Statement of the Case, petitioner's Taking Clause argument rests upon the wholly fallacious premise that the opinion below required it to open its enclosed arcade to leafletters,[6] when in fact the opinion indicated that leafletters could be restricted to the exterior sidewalks and parking lots.

The petitioner has set forth no special or important reasons, under the guidelines for consideration for a petition for a writ of certiorari, why the application should be granted. Rule 10.1. The law in this area was settled only fifteen years ago. *See* Rule 10.1(c). There are no conflicts, such as among the Courts of Appeals, that would require the Court to act. Rule 10.1(a). Notably, although state courts of last resort have differed as to whether their own constitutions should permit expression at their malls, these courts have not disagreed over the Taking Clause or compelled speech issues under the Federal Constitution. *See* discussion, *New Jersey Coalition*, 138 N.J. at 47-53, 650 A.2d at 768-70.

Most saliently, the decision palpably has not "so far departed from the accepted and usual course of judicial proceedings" to call for the supervision of the Court. Rule 10.1(a).

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6. Cert. Pet. at 22 ("the New Jersey court imposes state control over the core (and most valuable) portion of petitioner's property").

I.

THE REQUISITES OF *STARE DECISIS* MANDATE THAT THE COURT NOT REVERSE THE DECISION BELOW, AND REQUIRE THE COURT TO DENY THE PETITION FOR A WRIT OF CERTIORARI.

The petition before the Court represents a frontal assault on the holding in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), a unanimous decision written by the Chief Justice just fifteen years ago. Petitioner claims that "in the 15-year interim since *PruneYard*," Cert. Pet. at 10, new constitutional doctrine has emerged which requires a different result. Under the mandates of the principles of *stare decisis*, the Court should leave the *PruneYard* decision undisturbed.[7]

It is axiomatic that "[a]lthough adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Moreover, the decision whether to overrule established precedent must also take into consideration the extent to which the challenged doctrine "has become integrated into the fabric of the law." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992). Overruling such precedent not only may have consequences for "the ideal of the rule of law," but such precedent "is likely to have engendered substantial reliance." *Adarand*

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7. Since 1980, this Court has consistently reaffirmed the *PruneYard* holding. *E.g.*, *Hurley*, 63 U.S.L.W. at 4631; *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445, 2466 (1994); *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2321 (1994); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986); *Public Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 9-12 (1985); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191 (1985); *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984).

Constructors, Inc. v. Peña, 63 U.S.L.W. 4523, 4532 (U.S. June 13, 1995). Adherence to precedent is the rule, not the exception; only those cases "duly tested by experience [and having] been found to be inconsistent with the sense of justice or with the social welfare . . ." should be considered for possible overruling. Benjamin N. Cardozo, *The Nature of the Judicial Process* 149 (1921).

Since *PruneYard*, numerous state courts of last resort have considered the issue of leafletting at shopping centers or other private property under their own constitutions, and at least five, in addition to California and New Jersey, have decided that their free speech provisions did protect such activity to some extent.[8] No reasonable person could believe that allowing leafletters and petition-gatherers onto the outside sidewalks of a forty-six acre shopping mall is inconsistent with a sense of justice or with social welfare.

Without doubt, there is no pressing policy reason that mandates the overturning of *PruneYard*.

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8. *See Lloyd Corp. v. Whiffen*, 315 Or. 500, 849 P.2d 446 (1993); *Bock v. Westminster Mall Co.*, 819 P.2d 55 (Colo. 1991); *Batchelder v. Allied Stores Int'l*, 388 Mass. 83, 445 N.E. 2d 590 (1983); *Alderwood Assoc. v. Washington Environmental Council*, 96 Wash. 2d 230, 635 P.2d 108 (1981); *see also, Commonwealth v. Tate*, 495 Pa. 158, 432 A.2d 1382 (1981), and *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co.*, 512 Pa. 23, 515 A.2d 1331 (1986).

II.

REQUIRING THE MALL AT SHORT HILLS TO ACCOMMODATE LEAFLETTERS AND PETITION-GATHERERS DOES NOT CONFLICT WITH THE MALL'S FIRST AMENDMENT RIGHTS, AND DOES NOT REPRESENT STATE COMPULSION OF SPEECH.

The petitioner maintains that the decision of the New Jersey Supreme Court in *New Jersey Coalition* is tantamount to forcing The Mall at Short Hills to subsidize the petitioner's political speech. Cert. Pet. at 11 to 20. This concern is misplaced; the decision below in no way treads upon The Mall at Short Hills' rights under the First Amendment of the United States Constitution.

In *PruneYard Shopping Center v. Robbins,* 447 U.S. 74, 85-89 (1980), the Court held that a state's protection of expressive activity at a privately-owned shopping mall was not a "forcing" of a private party to use his property as a forum for speech by others. The Court reaffirmed a state's "sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution." *Id.* at 81 (citing *Cooper v. California,* 386 U.S. 58 (1967)).

The Court held that a shopping mall was "a business establishment open to the public to come and go as they please," and thus was not limited to personal use. 447 U.S. at 87. In addition, the Court also held that it was quite unlikely that the public could confuse the views of people seeking signatures or passing out leaflets with those of the mall's owners. *Ibid.* Finally, the Court determined that the owner can disavow any connection with messages "by simply posting [disclaimer] signs in the area where the speakers or handbillers stand." *Ibid.*[9]

9. The Court also noted that the state was not requiring the owner of the mall to display a specific message on the property. 447 U.S. at 87.

Little in this case distinguishes it, factually, from *PruneYard.* The petitioner has barely even argued why the measures suggested in *PruneYard* would be an ineffective prophylaxis to its specter of compelled or subsidized speech.

The *New Jersey Coalition* decision lies squarely within the ambit permitted by *PruneYard.* The New Jersey Supreme Court limited leafletters and petition gatherers to the *outside* of the mall. *New Jersey Coalition,* 138 N.J. at 378, 650 A.2d at 783.[10]

The post-1980 cases cited by the petitioner create no implication that *PruneYard's* basic holding should be disturbed.[11] In *Pacific Gas and Electric Co. v. Public Utilities Commission,* 475 U.S. 1, 15 (1986), the Court held that the First Amendment proscribed a state from requiring a privately-owned public utility to include messages in its billing envelopes. However, the Court distinguished *PruneYard* at length, noting that the mall "was the open area of a shopping center into which the general public had been invited [and] was, almost by definition, peculiarly public in nature." *Id.* at 12 n. 8. The Court also observed that the mall's owner could exercise his own expressional rights on the facility itself. *Id.* at 12.[12] Moreover, the regulation in *Pacific Gas* required that materials of a certain viewpoint be disseminated, *ibid;* such a

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10. *See* Counter-Statement of the Case, *ante.*

11. The Mall at Short Hills places heavy reliance upon *Wooley v. Maynard,* 430 U.S. 705 (1977), where the Court permitted a motorist, under the First Amendment, to cover-over an unwanted slogan on an automobile license tag. However, the Court, in *PruneYard,* already distinguished *Wooley.* 447 U.S. at 87.

12. The Court also noted in *PruneYard* that the mall's owners did not allege that they disagreed with the plaintiff's messages, which The Mall at Short Hills has contended here. Given the size of the petitioner's mall, and the other factors found in this openness, *see New Jersey Coalition,* 138 N.J. at 338-

(Cont'd)

content-based requirement clearly violated the First Amendment, bringing to bear considerations not present here.

The petitioner also cites to *Roberts v. United States Jaycees,* 468 U.S. 609 (1984). However, in *Roberts,* the Court, citing to *PruneYard,* 447 U.S. at 81-88, reaffirmed that "[a] State enjoys broad authority to create rights of public access on behalf of its citizens." 468 U.S. at 625. The Court held that the First Amendment was no bar to a state's requirement that a private organization, the Jaycees, admit women; such a mandate was no impediment to the ability of the Jaycees to engage in protected political activities or to disseminate its views. *Id.* at 627. The rights to expression possessed by a huge, regional shopping mall, and its ability to distance itself from the message of leafletters and petitioners, are plainly protected by the safeguards suggested in *PruneYard.*[13]

The *PruneYard* decision was again cited with approval in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 63 U.S.L.W. 4625, 4631 (U.S. June 19, 1995). The Court

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(Cont'd)
43, 372-73, 650 A.2d at 746-66, 780-81, this attempted refined distinction by the petitioner is inconsequential.

The New Jersey ruling is both content and viewpoint neutral. Groups which agree or disagree with the so-called views of The Mall at Short Hills may both take advantage of it.

13. In *Lehnert v. Ferris Faculty Ass'n,* 111 S. Ct. 1950, 1955, 1963-64 (1991), relied upon by The Mall at Short Hills, the Court, under the First Amendment, voided a rule permitting a union to charge public employees it represented fees for engaging in lobbying efforts. Palpably, The Mall at Short Hills is not being compelled or asked to donate money to the respondent's organization. Although the petitioner argues that it will incur insurance costs, no evidence of such extra expense was adduced at trial, and any such problems can be addressed through regulation.

found that Boston's St. Patrick's Day parade itself was expressive activity; in sharp contrast, the "proprietors [of a shopping mall] were running a business establishment that is open to the public to come and go as they please." *Ibid.*

PruneYard is a case that is full of vigor, and nothing suggested by the petitioner could even remotely lead to the conclusion that it should be overturned.

Equally evident is that the *New Jersey Coalition* decision was carefully decided and crafted. The New Jersey Supreme Court assessed the record of the activities of each of the defendant malls and came to a fair and considered opinion. 138 N.J. at 338-43, 372-73, 650 A.2d at 763-766, 780. The Court reasonably and accurately balanced the rights of the owners of the regional shopping malls against the need of the public for access to places to disseminate ideas. Indeed, as noted in the opinion for this Court in *International Society for Krishna Consciousness v. Lee*, 112 S. Ct. 2711, 2714 (1992), the act of "peaceful pamphleteering" is in no way incompatible with a multi-purpose environment such as a shopping mall.[14]

In addition, the New Jersey Supreme Court's holding is based, in part, upon knowledge of the conditions prevalent in New Jersey, a very highly suburbanized state with several impoverished, formerly industrialized cities. *Id.* at 346-47, 650 A.2d at 767-768. The State court system has concluded, under New Jersey's Constitution, *N.J. Const.* art. I, ¶¶ 6 and 18, that the public's interest would be best served by this very limited intrusion upon the rights of the private owners of property. There plainly is no need for a national standard limiting the right to expression at a regional shopping mall.

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14. Although the forum involved was an airport, Justice O'Connor's opinion observed that "the Port Authority is operating a shopping mall as well as an airport."

III.

THE DECISION OF THE NEW JERSEY SUPREME COURT IS CONSONANT WITH THE TAKING CLAUSE OF THE FIFTH AMENDMENT.

Thee petitioner maintains that the decision of the New Jersey Supreme Court in *New Jersey Coalition* transgresses upon the Taking Clause of the Fifth Amendment. Its argument is misplaced. In 1980, in *PruneYard Shopping Center v. Robins,* 447 U.S. at 82-85, the Court fully addressed the Taking Clause issue. Much as in the instant matter, in *PruneYard,* people set up a card table at a shopping mall, distributed pamphlets, and asked people to sign petitions to be sent to government officials. *Id.* at 77. The Court held that the factors that must be examined were "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Id.* at 83. The Court concluded that this "clearly [did] not amount to an unconstitutional infringement of [a mall owner's] property rights under the Taking Clause." *Ibid.* The Court noted that the mall could establish regulations that would minimize interference with the establishment's operation. *Id.* at 83-84.

Seemingly, the petitioner attempts to cast the adverse *PruneYard* holding as being the result of the failure of the attorney representing the PruneYard Shopping Center to present sufficient evidence. Cert. Pet. at 12, 15, 21. However, the petitioner brings nothing more than a naked assertion, apparently based on its self-serving poll and subjective and irrelevant assertions about the Mall's "unique architectural design," *ibid,* that the evidence in this case differs from that presented in *PruneYard.* The Mall at Short Hills looks about the same as any other regional shopping mall. All regional shopping malls, including the PruneYard Shopping Center, The Mall at Short

Hills, and the others named in the action below, were designed "with the view of the maximization of sales and the return on the owner's investment." *See id.* at 22.[15] Most significantly, the *PruneYard* decision was cited with approval only last year, in *Dolan v. City of Tigard,* 114 S. Ct. 2309 (1994), a Taking Clause case.

In analyzing what may constitute an unconstitutional taking of private property, the Court has focused on two discrete issues. *Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886, 2893 (1992). First, a taking occurs when the regulations "compel the property owner to suffer a physical 'invasion' of his property. In general (at least with regard to *permanent* invasions) . . . we have required compensation." *Ibid* (emphasis supplied) (citing *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982)). Second, a taking happens when "regulation denies all economically beneficial or productive use of land." 112 S. Ct. at 2893-94. *See also, Dolan v. City of Tigard,* 114 S. Ct. at 2321 (not permitting a permanent recreational easement on private property, but approving of *PruneYard* holding).[16]

Two conclusions are evident: the New Jersey Supreme Court

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15. Without citing to the record, the petitioner pleads that The Mall at Short Hills is designed to attract "upscale" customers; this is said to make the mall "unique." Cert. Pet. at 21. The wealthy are as interested in public affairs as are the rest of society. Local environmental issues frequently arise in New Jersey; there is no reason to deny the wealthy an opportunity to reach others at what plainly is the predominant regional facility, The Mall at Short Hills.

16. Petitioner's claim for "payment" for the supposed easement created by having leafletters on its property periodically, Cert. Pet. at 25, appears to be rhetorical. At no point in this litigation has the petitioner attempted to set forth what value it believes is lost by having leafletters at its facility. The petitioner's loud tocsins and klaxons to the contrary notwithstanding, the State of New Jersey is not expropriating the mall, nor *collectivizing* it, Cert. Pet. at 10, 25, nor confiscating it, nor permanently occupying it with squatters.

has not permitted a permanent occupation of a mall, and it most certainly does not deny its owners all economically beneficial use. The petitioner unconvincingly argues that the holding below has created "a *permanent* easement. . . ." Cert. Pet. at 24 (emphasis in original). In no way does the *New Jersey Coalition* holding permit people to continuously pass to and fro, or to permit the mall to be continually traversed. *See ibid (citing Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)).[17]

In reality, the petitioner seeks an overthrow of the categories enunciated in *Lucas*. Cert. Pet. at 24.[18] There is no sound basis, either in the facts of the case, the law, or social welfare, for an overruling of this most recent of precedents, especially when coupled with its affirmance of rights to freedom of expression to a broad spectrum of the people of New Jersey. The petitioner has raised no compelling reason why *stare decisis* should be abandoned, and why *PruneYard's* Fifth Amendment Taking Clause analysis should be reconsidered.

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17. Petitioner cites to *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), in support of the "to and fro" argument. In *Nollan*, the Court distinguished a shopping mall situation. It held that "[t]he holding in *PruneYard*. . . . is not inconsistent with this analysis, since there the owner had already opened his property to the general public, and in addition permanent access was not required." 483 U.S. at 832 n. 1. The petitioner candidly admits that *Nollan* distinguished *PruneYard*. Cert. Pet. at 24 n. 20.

18. The petitioner wishes to "stitch together" "temporary occupations" of private property to rise to the level of a Taking Clause violation. This approach violates the sound policy set forth in *Lucas*, 112 S.Ct. at 2893, and in no wise should be applied to a case involving freedom of expression.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of New Jersey should be denied.

Respectfully submitted,

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APPENDIX — STIPULATIONS DATED MAY 31, 1991

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
BERGEN COUNTY

DOCKET NO. C-477-90E

Civil Action

NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST, et al.,

Plaintiffs,

v.

J.M.B. REALTY CORP., d/b/a RIVERSIDE SQUARE, et al.,

Defendants.

STIPULATIONS AS TO THE MALL AT SHORT HILLS

The undersigned, counsel for Plaintiffs, and counsel for Defendant Prutaub Joint Venture, hereby stipulate that the following may be admitted as uncontested fact:

1. The Mall at Short Hills (Short Hills) is a regional

shopping center situated on forty-six acres of land, located at the intersection of Route 24 and John F. Kennedy Parkway in Essex County, New Jersey.

2. Short Hills was purchased by Prutaub Joint Venture in approximately 1980 and was not, at that time, a wholly enclosed mall as it exists today. Prutaub Joint Venture did additional development to create the wholly enclosed mall that exists currently.

3. Short Hills is currently owned by Prutaub Joint Venture. The Taubman Company, Inc., is the managing agent for Short Hills, as well as malls in California and Connecticut.

4. Short Hills has two (2) department stores, approximately ten food establishments, and approximately 130 other tenants, including two banks, two beauty salons, an optometrist, a shoe repair, drug store, art galleries and two brokerage houses.

5. Short Hill is a fully enclosed shopping center with two (2) levels and five thousand two hundred (5,200) parking spaces. Approximately 148,056 square feet of the mall are designated as common areas.

6. There are various benches and various plants scattered throughout the common area. There are benches scattered along the perimeter sidewalk.

7. Short Hills is currently open from 10 a.m. to 9:30 p.m. on week days, 10 a.m. to 6 p.m. on Saturdays, and 12 noon to 5 p.m. on Sundays. These hours vary in the summer.

Appendix

8. Short Hills is serviced by New Jersey Transit buses. There is a New Jersey Transit bus shelter located on the property owned by Prutaub Joint Venture, at the outside perimeter of the parking lot surrounding the mall.

9. Prutaub Joint Venture occasionally hires off-duty Millburn police officers for mall security. The officers wear their uniforms, guns, and badges, while they are so employed.

10. On their patrols, Millburn municipal police officers sometimes drive through the Short Hills parking lots. The Millburn municipal police officers enforce some of the traffic ordinances such as illegal use of handicapped parking spaces.

11. Short Hills has adopted a written trespass policy prohibiting expressive activity anywhere on mall property by anyone. Said policy, by way of example, prohibits soliciting, petitioning, collecting signatures, speech making, and distributing handbills.

12. On November 10, 1990, a representative of the Coalition handed out literature in the interior common areas of Short Hills. She was approached by Richard Hackett and a Short Hills security guard and given a copy of the mall's "Policy on Trespassing."

13. Short Hills has a permanently fixed stage which can and is used for special events. This area can accommodate a seated and/or standing program.

14. Short Hills has sponsored the following events in 1990 and 1991:

Appendix

- Mini Symphony performance of June 4
- Morris Nanton Jazz Trio
- String Ensemble of June 25
- September Fall Concert Series
    1. Nelson Riddle Orchestra
    2. Tommy Dorsey Orchestra
    3. Classical Beethoven and Bach
    4. Guitars of Splendor
    5. Glenn Miller Orchestra
    6. Morris Nanton Jazz Trio
    7. Piano Concerto
    8. Classical Mozart by mini-symphony
- Special Performance of Count Basie Orchestra
- Santa Claus
- Peter Rabbit Easter program and display
- Valentine's Day piano concert series

Appendix

These events were scheduled during mall hours. The September concert series was held on eight consecutive Sundays from 2 p.m. to 3 p.m.

15. Short Hills sponsors a fitness walk program, which allows access to the mall before daily business hours, from 7:30 a.m. until 10:00 a.m. The program is sponsored in cooperation with the Morristown Memorial Hospital, and open to all members of the public, who register in writing and receive a license. Over two hundred people have registered with the mall for the program.

16. Most mall patrons come to Short Hills by private automobile and park in parking lots located on mall property.

17. The enclosed mall area at Short Hills is completely surrounded by walkways and/or parking areas which are wholly located on the mall's property. There are no public streets or walkways between the parking areas and bus stop and the enclosed mall.

18. Short Hills is unaware of claims for damages or injury filed against the mall as a result of activity conducted by non-commercial organizations within the common area of the mall.

s/ Jo Ann Burk
Jo Ann Burk
Attorney for Defendant Short Hills

s/ Frank Askin
Frank Askin
Attorney for Plaintiffs

DATED: May 31, 1991